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No. 04-231

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Barber Foods, Inc., d/b/a Barber Foods,
Cross-Petitioner,

v.

Abdela Tum, et al.

On Conditional Cross-Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

RESPONSE TO CONDITIONAL CROSS-PETITION

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RESPONSE TO CROSS-PETITION

Cross-petitioner Barber Foods (Barber) does not dispute that the questions presented by the petition for certiorari are important and have divided the circuits. See Pet. 5-11. The Solicitor General in the parallel *IBP* case comes to the same conclusion. Br. of United States in *IBP, Inc. v. Alvarez*, No. 03-1238, at 7-12. Nor does Barber dispute that this case provides an appropriate vehicle for this Court to address these questions. See Pet. 12-13. As the United States explains in *IBP*, this case "would likely provide the Court an opportunity to resolve the existing disagreement among the circuits over the walking time issue." U.S. *IBP* Br. at 15-16 n.2.

This Court should accordingly grant certiorari in both *IBP* and this case and consolidate the two for argument. The critical facts in the two cases – particularly, the equipment involved – are somewhat different, and the Court would benefit from considering the questions presented in a broader context. Certiorari should not be granted in *IBP* alone because, as the Solicitor General explains, only this case raises a further "question of considerable significance to the administration of the FLSA—whether donning and doffing time should be considered together with walking time in assessing whether the time devoted to those activities is de minimis, or whether donning and doffing time should instead be examined in isolation." *Ibid.*

The *IBP* petitioner argues at cross-purposes with itself in contending that this case is a poor vehicle because the number of plaintiffs (22) and the amount of damages claimed ($70,000) are, in its view, "trivial." Supplemental Br. of IBP, Inc. in No. 03-1238, at 7. There is certainly no genuine suggestion that the parties will not litigate this case vigorously. For petitioners, hourly wage workers, the amount of money at stake is substantial; IBP's point that it faces considerable liability is just a back-handed acknowledgement that its position would deprive employees of considerable compensation for work they perform. Barber Foods faces not only the dam-

ages award IBP cites but also the prospect of substantial attorneys fees if petitioners prevail; Barber has therefore found the claim sufficiently important that it has litigated the case aggressively, including through, for example, a jury trial and cross-petition for certiorari. Indeed, if the *IBP* petitioner is correct that the amount at stake for a party affects the vigor with which it litigates – and thus the strength of the adversarial presentation in this Court – that is an argument for granting cert. in this case rather than *IBP*: the Solicitor General's very point was that the plaintiff-respondents in *IBP* have nothing to gain financially by litigating the case here, given that they are already guaranteed an equivalent award under state law.

For its part, Barber urges the Court to review the First Circuit's decision in this case for a further reason: to resolve an alleged circuit conflict over whether time spent donning and doffing required light safety equipment is compensable. The conditional cross-petition should be denied, however. Barber does not seek a change in the court of appeals' judgment: Barber secured complete relief against petitioners' claims in the lower courts, and it would secure no further relief by prevailing on the question raised by the cross-petition.

Certiorari on the issue raised by the cross-petition is inappropriate for a further reason: the court of appeals did not finally decide the issue. This Court accordingly should resolve the issues raised by the petition, but should leave the question presented by the cross-petition to be addressed in the first instance on remand to the extent they were properly preserved below.

Finally, Barber is also wrong on the merits of the issue the cross-petition raises. *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), settled that time spent donning and doffing safety equipment that is required by the employee's working conditions is compensable work to which the Portal-to-Portal Act's exclusion of preliminary and postliminary activities does not apply. Those lower courts that have held otherwise have

misunderstood this Court's precedents and conflated the distinct questions whether an activity is "work" and whether the time it takes to perform that activity is *de minimis*.

ARGUMENT

I. Because Barber Foods Does Not Seek To Alter The Judgment In This Case, Its Cross-Petition Is Improper.

Barber Foods prevailed below as to every component of petitioners' claims; petitioners were awarded neither damages nor any other relief. To be sure, the district court denied Barber summary judgment on the issue raised by the cross-petition, holding that the time petitioners spent donning and doffing required equipment was compensable work under the Fair Labor Standards Act and Portal-to-Portal Act. But the jury subsequently found that the time spent on that donning and doffing, taken alone, was *de minimis*, and therefore awarded no relief. The court of appeals let that judgment stand. Barber thus does not seek to alter the judgment, nor could the judgment possibly be altered in Barber's favor as a direct or indirect result of a favorable resolution of the question presented by the cross-petition.

Despite the fact that it had already prevailed entirely at the district court level, Barber Foods cross-appealed to the First Circuit, challenging the partial denial of summary judgment. The court of appeals correctly refused to consider the cross-appeal, citing this Court's recent admonition that "[a]s a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous." *Mathias* v. *Worldcom Techs.*, 535 U.S. 682, 684 (2002) (dismissing writ as improvidently granted). As the First Circuit explained, "[i]f we were to do as Barber Foods asks and reverse the challenged district court finding, our action would provide no tangible relief to Barber Foods; the company has already received all requested relief." Pet. App. 12a.

The same rule applies in this Court. A respondent must cross-petition "if such party seeks to change the judgment below or any part thereof." STERN, GRESSMAN, SHAPIRO, & GELLER, SUPREME COURT PRACTICE § 6.35, at 444 (8th ed. 2002). But if the respondent seeks no such change, a cross-petition is not necessary or appropriate. A prevailing party may, without cross-petitioning, defend the judgment of the court below "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); see also, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 396 (1999); *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994). See generally STERN, GRESSMAN, SHAPIRO, & GELLER, *supra*, at 444-48. The assertion of a "different legal basis" for a judgment, which is precisely what Barber seeks here, does not constitute a request for modification of a judgment. *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982).

Because the cross-petition is unnecessary, it should be denied. Prevailing parties not only are not required to appeal or petition; they may not do so. See *Mathias*, 535 U.S. at 684 (dismissing certiorari because "a party *may not* appeal from a favorable judgment" (emphasis added)); *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U.S. 151, 176 (1934) (a party "has no right of appeal from [a] decree in its favor").

II. In Any Event, The Questions Raised By The Cross-Petition Should Be Resolved, If Necessary, On Remand.

If this Court denies the cross-petition, Barber may raise the arguments set forth in the cross-petition as alternate grounds for upholding the judgment below. However, this Court need not and should not reach those arguments, because, as noted above, the court of appeals has never addressed them. See Pet. App. 12a; see also Answer of Barber Foods to Pet. for Panel Rehr'g and Rehr'g En Banc at 15 ("The panel did not find it necessary to address Barber Foods'

cross-appeal because it determined that the walking and waiting time at issue was noncompensable even assuming that it followed compensable doffing. * * * Barber Foods believes the panel's decision was correct. If the panel were to consider retreating from that position, it would then become necessary to address the central issue raised by the cross-appeal—the compensability of the donning and doffing in this case * * *.").

If this Court grants certiorari on the issues raised by the petition, but not those raised by the conditional cross-petition, and then rules on the merits in petitioners' favor, it should—to the extent these issues remain relevant and properly preserved—remand the case for the court of appeals to determine in the first instance the compensability of the underlying donning and doffing activities. See, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) (declining to consider respondents' alternate argument in defense of judgment below because "we do not decide in the first instance issues not decided below").

Nor is the purported circuit conflict identified by the cross-petition logically antecedent to the questions presented by the petition. The cross-petition is incorrect in its assertion (at 9) that under either the Ninth Circuit's approach in *Alvarez* or the Tenth Circuit's approach in *IBP* v. *Reich*, 38 F.3d 1123 (1994), petitioners' claim would fail because the time they spent donning and doffing equipment would not be compensable.

Although the First, Ninth, and Tenth Circuits have indeed taken slightly varying approaches to determining whether time spent donning and doffing various types of equipment is compensable, at least *some* of the items petitioners donned and doffed are sufficiently heavy and time-consuming to don that the time associated with them would plainly be compensable under all three circuits' rules. For example, among the equipment Barber Foods requires set-up operators, meatroom associates, and shipping associates to use are back belts (also known as weight belts), safety harnesses that pro-

tect workers who must move or lift heavy objects from injury. The district court in *Alvarez* specifically held time spent donning and doffing such belts compensable, and the Ninth Circuit affirmed this holding. 2001 U.S. Dist. LEXIS 25344, *36 (E.D. Wa. 2001), *aff'd*, 339 F.3d 894, 903-04 (2003). Similarly, in *Reich*, weight belts were among those items the Tenth Circuit deemed "special safety equipment," the donning and doffing of which was compensable. 38 F.3d at 1124-25.

Thus, even if the compensability of walking and waiting time depended on some of the associated donning and doffing time being compensable, that requirement—under any of the circuits' approaches—would be satisfied here. Moreover, petitioners have argued that "walking and waiting" time is compensable in its own right; its compensability does not turn on that of the associated donning and doffing. Walking, waiting, donning, and doffing are all "integral and indispensable" to petitioners' principal job activities. Petitioners' view, and that of the Department of Labor, is that the *first* compensable activity an employee undertakes triggers the start of a continuous, compensable "workday"; that activity need not be donning a piece of gear, but could be, for example, waiting in line at an equipment distribution station.[1]

The questions posed by the petition and the cross-petition may therefore be interrelated, but this Court's ability to answer the former does not depend on its also answering the latter. Indeed, depending on how this Court resolves the questions raised by the petition, the questions raised by the cross-petition may become irrelevant. To the extent they remain relevant, they can be resolved on remand if properly preserved.

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[1] Furthermore, petitioners have argued that time spent on all compensable activities should be aggregated for the purpose of the *de minimis* rule, such that it would not matter whether time spent donning or doffing certain equipment is, per the Ninth Circuit's rule, *de minimis* when taken alone. See Pet. 9-10; *supra* at 1.

III. Petitioners Are Correct On The Merits Of The Question Presented By The Cross-Petition.

As the petition explained (at 17), there are two separate steps involved in determining whether the FLSA requires an employer to compensate an employee for the time spent on a particular activity. First, the court must determine whether the activity is compensable work: that is, whether it meets the definition of "work," and is not statutorily excluded from that definition by the Portal-to-Portal Act as "preliminary" or "postliminary" activity. Second, the factfinder must determine whether the time spent on compensable activities is more than *de minimis*. If both requirements are met, the employer must pay. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

The Tenth Circuit has improperly conflated the two questions, while the First Circuit (in this case) and Ninth Circuit (in *Alvarez*) have correctly recognized the distinction between them. The Tenth Circuit in *Reich* erred in holding that donning and doffing light safety gear does not constitute "work" because it involves no "exertion." Indeed, cross-petitioners notably do not defend the Tenth Circuit's reasoning. *Reich* squarely conflicts with this Court's holding in *Tennessee Coal, Iron, & Railroad Co.* v. *Muscoda Local No. 123*, 321 U.S. 590 (1944), which refers specifically to "physical or mental exertion *(whether burdensome or not)*." *Id.* at 598 (emphasis added). There is simply no question that donning and doffing, for example, a lab coat, safety goggles, a hard hat, and gloves involves "exertion" – a term that cannot be meant to imply that a task is difficult or particularly time-consuming, because that reading would read out the emphasized qualifier. Although it is true that the FLSA does not impose liability on the employer for activities that, taken together, occupy very little time, that is because of the *de minimis* rule, not because of the definition of "work." *Reich* conflates the two distinct inquiries.

While correctly holding that time spent donning and doffing "unique" safety equipment was (along with associated walking and waiting time) compensable, the Ninth Circuit nonetheless erred in holding that time spent donning and doffing "non-unique" equipment was "*de minimis* as a matter of law." Cross-petitioners also notably do not defend the Ninth Circuit's rule. This Court held in *Mt. Clemens*, the case that established the *de minimis* rule, that its application turned on findings of fact. 328 U.S. at 692 ("The *de minimis* rule can doubtless be applied to much of the walking time involved in this case, but the precise scope of that application can be determined only *after the trier of facts makes more definite findings* as to the amount of walking time in issue." (emphasis added)). It cannot be true, as Barber would have it, that time spent donning and doffing certain types of equipment is simply categorically *de minimis*; it matters greatly how much time is spent, a fact question that will vary from case to case.

Moreover, as explained in the petition for certiorari, the consensus view among lower courts is that the various compensable activities performed in a workday should be aggregated together in order to determine whether the *de minimis* rule applies. See Pet. 9 (collecting cases). Indeed, many courts aggregate across the entire period encompassed by the claim; but at the very least, activities in a particular day should be added together. It contravenes the point of the *de minimis* rule to calculate separately the amount of time spent donning each particular piece of equipment, or, for that matter, particular categories of equipment. The Ninth Circuit thus erred in holding that, even though time spent walking, waiting, and donning and doffing "unique" equipment was compensable, time spent donning and doffing "non-unique" equipment was *de minimis*: the *de minimis* determination should have been based on the time spent on all of those activities added together.

Barber instead presses in the question presented by the cross-petition an argument that *no* court of appeals has adopted – *viz.*, that the donning and doffing of light safety

equipment is "preliminary" or "postliminary" activity excluded from compensation by the Portal-to-Portal Act. This novel argument lacks merit as well. Barber quotes a Labor Department regulation to the effect that "clothes changing 'when performed under the conditions normally present' would generally be considered noncompensable preliminary and postliminary activities," a rule that this Court supposedly "[e]mphasiz[ed]" in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956). Cross-Pet. 13-14 (quoting 29 C.F.R. 790.7(g)). That is not accurate: the regulation provides that clothes changing is preliminary or postliminary, *except in circumstances like these*, where the clothes are donned for health and safety reasons. 29 C.F.R. 790.7(g) n.49 ("[T]he changing of clothes[] may in certain circumstances be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity.'"). *Steiner*, in turn, settled that compensation was required in these circumstances. 350 U.S. at 252-53, 256.

Nor can Barber identify any support in either the regulation or any of this Court's cases to support the line it would draw: that time spent donning and doffing "heavy" or "unique" equipment is compensable, but "light" or "non-unique" equipment is not. That distinction is so vague as to be un-administrable. Equally important, it has nothing to do with whether an activity is "integral" or instead "preliminary or postliminary" to the employers' duties. At the very least, once an employer or the government determines that equipment *is required* for health and safety reasons, it is implausible to say that the donning and doffing of that equipment is not integrally related to work activities.[2]

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[2] Petitioners, of course, maintain—and this Court's decision in *Steiner* makes clear—that the relevant criterion should be whether the activity is in *fact* required for health or safety reasons because of the nature of the job and the working conditions, even if it is not formally required by the employer or by law. See Pet. i, 22-23.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for certiorari should be granted and the cross-petition denied.

Respectfully submitted,

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